

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN -3 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

BRIAN S.,	)	2 CA-JV 2010-0011
	)	DEPARTMENT B
Appellant,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 28, Rules of Civil
ARIZONA DEPARTMENT OF ECONOMIC	)	Appellate Procedure
SECURITY and CARLIE B.,	)	
	)	
Appellees.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. JD200900005

Honorable Stephen M. Desens, Judge

AFFIRMED

Mark A. Suagee, Cochise County Public Defender  
By Eric J. Levy

Bisbee  
Attorneys for Appellant

Terry Goddard, Arizona Attorney General  
By Claudia Acosta Collings

Tucson  
Attorneys for Appellee Arizona  
Department of Economic Security

B R A M M E R, Judge.

¶1 Appellant Brian S. appeals from the juvenile court’s order terminating his parental rights to his daughter, Carlie B., based on his felony conviction and the length of his sentence. *See* A.R.S. § 8-533(B)(4). He challenges the court’s finding that termination was in Carlie’s best interests. We affirm.

¶2 To justify termination of Brian’s parental rights, the Arizona Department of Economic Security (ADES) had the burden of proving the alleged statutory ground for severance by clear and convincing evidence and proving by a preponderance of the evidence that severance was in Carlie’s best interests.<sup>1</sup> *See* A.R.S. §§ 8-533(B), § 8-537(B); *Kent K v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). We will affirm a juvenile court’s termination order “unless it is clearly erroneous.” *Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002).

¶3 Carlie was removed from her mother’s care in January 2009, when she was approximately one year old. At the time, Brian was in jail, awaiting sentencing on various felony offenses. Approximately a week later, Carlie was placed with her maternal great aunt, where she has remained throughout the underlying proceedings. Carlie was adjudicated dependent in March 2009, after her parents admitted to allegations contained in an amended dependency petition. The juvenile court approved a case-plan goal of family reunification, and in May 2009 it approved a concurrent goal of severance and adoption, setting a permanency planning hearing for July 2009. As a result of that

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<sup>1</sup>On appeal, Brian has not challenged the juvenile court’s findings regarding the statutory ground for termination.

hearing, the court directed ADES to file a motion to terminate parental rights, which it did, alleging as to Brian that his incarceration for a felony conviction would be of such a length as to deprive Carlie of a normal home experience for a period of years. Counsel for Carlie joined the motion on her behalf.

¶4 Evidence at the termination hearing in December 2009, showed Brian was serving sentences for multiple felony convictions and would remain incarcerated at least until his early-release date on or about November 30, 2013. His standard release date is February 15, 2014. The juvenile court found “[t]he length of [Brian’s] sentence is such that [Carlie] will be deprived of a normal home for a period of years in light of the facts and circumstances known to the court.” It also found ADES had proven by a preponderance of the evidence that termination was in Carlie’s best interests, stating:

[Carlie] is residing in a kinship placement with the paternal aunt who is committed to adopting her. The paternal aunt has twenty-five years of experience as a pre-school teacher and has had the child with her essentially every day since the child’s placement in January, 2009. Termination of parental rights will affirmatively benefit [Carlie] and provide her with a safe, nurturing, stable, permanent and loving home which will meet all of [her] physical and emotional needs without the fear of future substance abuse or neglect by her parents. A psychological evaluation in May or June 2005 indicated that the father may have had some cognitive disabilities and his IQ of 75 placed him in “the mildly dysfunctional range of functioning[.]” . . . It is not in the best interest of [Carlie] for permanency and/or stability reasons to speculate as to the father’s parenting capabilities some years down the line when he is released from prison[.]

On appeal, Brian has not challenged any of the court's underlying factual findings, only its ultimate determination that termination was in Carlie's best interests.

¶5 To establish that terminating a parent's rights is in a child's best interests, ADES must show that the child will "derive an affirmative benefit from termination or incur a detriment by continuing in the relationship." *Oscar O. v. Ariz. Dep't of Econ. Sec.*, 209 Ariz. 332, ¶ 6, 100 P.3d 943, 945 (App. 2004). "The existence of a current adoptive plan is one well-recognized example of such a benefit." *Id.* Brian contends, however, that the juvenile court's best interests finding in this case was unwarranted because an expert witness who had testified on his behalf had opined that termination would not be in Carlie's best interests. But the court was not required to accept the expert's opinion. As the trier of fact, it was "in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Id.* ¶ 4. Thus, we will accept its findings of fact "unless no reasonable evidence supports those findings." *Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 555, 944 P.2d 68, 70 (App. 1997). Further, we note that the expert testified primarily about the importance of contact and a continuing emotional, rather than legal, relationship between children and incarcerated parents. In this case, Carlie's great aunt testified she was willing to help Carlie see and communicate with Brian while he remained incarcerated, and she supported his plan to live in a home on the three-acre family property where she resides.

¶6 Because substantial evidence supported the juvenile court's finding that termination was in Carlie's best interests, we affirm its order terminating Brian's parental rights to Carlie.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Judge